

# THE THREE AGES OF LEGISLATION PEDAGOGY

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I would like to thank the New York University School of Law and its *Journal of Legislation and Public Policy* for hosting this symposium. Typical of N.Y.U. events, the organizers have been uniformly helpful and efficient.

I'd like to think about Rick Pildes's excellent question about the history of this pedagogy. Rick really hit the nail on the head in his comments about the rise and fall and the subsequent resurgence of the field of legislation.

I would divide the history of legislation pedagogy into three eras. The first is the period between the two world wars. In the 1920s and 30s, schools like N.Y.U. offered some promising legislation courses. This topic was exciting for many law professors because lawyers and law professors were beginning to realize that statutes are the primary source of law in the modern regulatory state. The most sophisticated courses were those developed by scholars such as Frederick de Sloovere<sup>1</sup> at N.Y.U., Walter Gellhorn<sup>2</sup> at Columbia, and Lloyd Garrison<sup>3</sup> and Willard Hurst<sup>4</sup> at Wisconsin. They developed case studies of regulatory structures and the legal and constitutional restrictions and empowerments for those regulatory structures. The first conceptually sophisticated materials on legislation were the Garrison and Hurst materials at the University of Wisconsin, which provided both a theo-

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1. See, e.g., Frederick J. de Sloovere, *Analytical Jurisprudence as Related to Modern Legal Methods*, 7 N.Y.U. L.Q. REV. 88 (1929–1930); Frederick J. de Sloovere, *Contextual Interpretation of Statutes*, 5 FORDHAM L. REV. 219 (1936); Frederick J. de Sloovere, *Steps in the Process of Interpreting Statutes*, 10 N.Y.U. L.Q. REV. 1 (1932–1933).

2. See, e.g., Walter Gellhorn & Seymour L. Linfield, *Administrative Adjudication of Contract Disputes: The Walsh-Healey Act*, 37 MICH. L. REV. 841 (1938–1939).

3. See, e.g., Lloyd K. Garrison, *The Power of Congress over Corporate Reorganizations*, 19 VA. L. REV. 343 (1932–1933); Lloyd K. Garrison, *Reorganization of Railroads Under the Bankruptcy Act*, 1 U. CHI. L. REV. 71 (1933–1934).

4. See, e.g., Willard Hurst, *Who Is the "Great" Appellate Judge?*, 24 IND. L.J. 394 (1948–1949); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950); JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN, 1836–1915* (1964).

retical and a practical legal, regulatory, and economic analysis of state and federal law on workplace insurance.<sup>5</sup> This first era of legislation pedagogy was an experimental era that coincided with the genesis of theoretical and practical thinking about the emerging modern regulatory state.

The second era, running from the 1940s to the 1970s, was a period of classical thinking and false starts. Harvard's Henry Hart, one of the most brilliant law professors of the century, hijacked the legislation course at Harvard and turned it into a legal process course. The legal process course, as Hart understood it, was mainly about judging. The course drew very little from theories of legislation, practices of legislatures, or advanced thinking about administration, but had a great deal to say about theories of judging—especially common law judging and statutory interpretation judging, and less about constitutional judging. Hart and his coauthor, Al Sacks, developed a comprehensive set of materials that were the foundational documents in the legal education of thousands of law students from the 1950s through the 1970s; the high points of Hart and Sacks's legal process materials were chapters one and seven, which systematically treated statutory interpretation in the modern administrative state.<sup>6</sup> These materials were widely influential among lawyers, law professors, and judges, and to a certain extent contributed to the death of legislation as an exciting area of law. Hart and Sacks killed legislation for almost a generation because their now classic materials reflected the nineteenth century's focus on judicial decision making, rather than the more recent focus on legislative and administrative decision making.

In the 1960s, constitutional law drew the most ambitious public law scholars away from legislation, and student activism rendered student bodies that were basically uninterested in the judge-centered methodology that Henry Hart and some of his colleagues believed to be the epitome of legal thought. In the 1970s, when Phil Frickey and I were in law school, legislation was basically a dead area of legal academic inquiry. Legislation courses were still taught at some law schools, but they were like the living dead—zombies of legal pedagogy.

The 1980s inaugurated a third era, the brightest of them all. This decade saw a resurgence of interest in legislation as a topic worth studying and teaching at law schools. There are three things that con-

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5. *LAW IN SOCIETY: A COURSE DESIGNED FOR UNDERGRADUATES AND BEGINNING LAW STUDENTS* (Lloyd K. Garrison & Willard Hurst eds., rev. ed. 1941).

6. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tentative ed. 1958).

tributed to this legislation renaissance, in addition to the obvious and overwhelming importance of the topic in our “Age of Statutes.” The first thing that contributed to the renaissance is the flip side of what Rick says undermined legislation as a topic of study in the 1960s: law professor and student interest in civil rights. By the 1980s, it was clear that the modern administrative state not only molds and manages the economy, but also debates and sets rules that protect the civil rights of women and minorities. For most of us today, the most critical civil rights protections are those found in legislation—not those found in federal or state constitutions. This is particularly true for people with disabilities,<sup>7</sup> pregnant women,<sup>8</sup> and lesbians, gay men, and bisexuals.<sup>9</sup> By the 1980s, the excitement that previously had galvanized student and professor interest in constitutional law was also invigorating legislation, as so much of the action was transferred there.

A second contributing factor to the legislation renaissance was the constitutionalization of democracy, which was also one of the reasons for the decline of the older legal process approach. Before the 1980s, lawyers and judges were turning issues of democratic process into issues of constitutional rights. Examples of the exciting developments of the time included vote dilution cases such as *Baker v. Carr*<sup>10</sup> and *Gomillion v. Lightfoot*,<sup>11</sup> not to mention the Voting Rights Act of 1965;<sup>12</sup> a generation of campaign finance cases including *Buckley v. Valeo*;<sup>13</sup> and challenges to state initiatives and referenda retracting rights from racial or sexual minorities.<sup>14</sup> Even some issues arising out of the operation of Congress became constitutionalized—most notoriously, the House’s expulsion of Representative Adam Clayton Powell.<sup>15</sup> These and other areas of constitutional inquiry not only deepened the excitement law professors and students felt toward legislation, but also stimulated interest in normative theories of political representation and equity.

Third, legislation was invigorated by fresh, exciting theories about the legislative and political process, including economic-based

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7. Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2000).

8. Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2000).

9. Employment Non-Discrimination Act of 2003, S. 1705, 108th Cong. (2003).

10. 369 U.S. 186 (1962).

11. 364 U.S. 339 (1960).

12. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

13. 424 U.S. 1 (1976).

14. E.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967).

15. *Powell v. McCormack*, 395 U.S. 486 (1969).

theories such as public choice, as well as more traditional pluralistic theories of the political process. Just as a new generation of Americans was growing up cynical about government, there was a body of public choice theory waiting to be mined, deployed, and argued over. Public choice theory infused a fair amount of conceptual excitement into issues such as statutory interpretation, campaign finance, lobbying, and political and legal process.

When Phil Frickey and I were in private practice together in the early 1980s, we were both astounded that our legal educations had so little connection with the most interesting intellectual work we were doing, namely, statutory interpretation. We concluded that the neglect of legislation was one of the greatest oversights in legal education, but presented a great opportunity for us. Accordingly, we agreed to author a casebook once we were both ensconced in teaching positions. Inspired by the three things that were stimulating new interest in legislation, we had some good ideas about how the casebook should be constructed; it should capitalize on the codification of civil rights protections, the constitutionalization of the political process, and the new public choice thinking.<sup>16</sup>

Our first big decision was to start our legislation materials with a case study of the Civil Rights Act of 1964.<sup>17</sup> We started with the fascinating sociological, political, and legislative struggle that preceded this new kind of statute, which we felt students would find very interesting. We then used the Act as a basis for illustrating positive and normative theories about the legislative process and for demonstrating how statutes evolve as agencies and courts apply them over time. The culmination of the chapter was *United Steelworkers v. Weber*,<sup>18</sup> the affirmative action case, which was doctrinally complicated, theoretically interesting, and normatively complex. To our surprise, *Weber* has been an enduring introduction to statutory interpretation; it remains relevant in the new century as a hot button issue for constitutional statutory law. Abner Mikva and Eric Lane, who produced a subsequent legislation book, had what we thought was also an excellent idea. Their case example was the Voting Rights Act,<sup>19</sup> which is another great example of a statutory case study that

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16. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1st ed. 1988).

17. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.); see ESKRIDGE & FRICKEY, *supra* note 16, at 1-36.

18. 443 U.S. 193 (1979); see ESKRIDGE & FRICKEY, *supra* note 16, at 65-93.

19. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.); see ABNER J. MIKVA & ERIC LANE, *AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS* 101-41 (1997).

combines the political process, constitutional issues, and very interesting issues of statutory interpretation, including the relationship between administrative and judicial interpretation.

The second thing that Phil and I did was to introduce a lot of theory, particularly public choice theory, but also deliberative theories of politics. We introduced them in chapter one and carried them through the rest of the book. Our third decision was to capitalize on the interesting constitutional dimensions of the electoral and representative process. Thus, we explored the doctrines, theories, and constitutional features of United States elections, the legislative process, and lobbying. Those chapters really didn't come into full fruition until we were joined by Beth Garrett,<sup>20</sup> who actually participated in the legislative process, although we did make an initial effort early on.

Our legislation casebook was a modest market success and was followed by several others. More importantly, however, it was followed by materials compiled by other professors teaching similar courses—much like the Hurst and Garrison materials of the 1930s and 1940s.<sup>21</sup> The widespread practice of putting together one's own photocopied materials has made this a particularly dynamic field, even though most compilations have not actually been published. Legislation courses therefore have grown like weeds in a vacant lot in the last twenty years, and most law schools, particularly the major ones, now offer at least one course in legislation. Some law schools, notably Georgetown, offer not just one course, but instead an entire program in legislation.

The most popular format for an introductory legislation course is one that surveys the electoral process, the legislative process and direct democracy, statutory interpretation, and administration. But other formats are also working with great success:

1. *Statutory Interpretation.* Many courses focus on statutory interpretation, including the course I have taught at Georgetown, N.Y.U., Vanderbilt, Yale, Toronto, Stanford, Virginia, Harvard, and Columbia. In three credit hours, I find that I am barely able to cover the theories, canons, and practice of statutory interpretation. I used to teach a more comprehensive course that included political and representative process materials, but recently I have focused on statutory interpretation, with the political theory and drafting materials in our book tied closely to that topic. Statutory interpretation is both theoret-

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20. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (3d ed. 2001).

21. *LAW IN SOCIETY*, *supra* note 5.

ically interesting to my students and to myself, and is incredibly practical because almost all of what young lawyers do is statutory interpretation. And yet most law schools still give students an overdose of common law learning and a ridiculously small amount of statutory interpretation learning. This is great for Frickey, Garrett, and Eskridge, because it sells books that students keep, but it's bad for students. In fact, it's a pedagogical scandal.

2. *Regulation of a Substantive Area.* A second kind of legislation course examines the interaction of different lawmaking and law-implementing mechanisms that enable the modern administrative state to regulate a particular economic or social activity. Willard Hurst created a fabulous course that focused on workplace injuries. Mark Tushnet has updated and deepened Hurst's materials and teaches them at Georgetown. At Ohio State and N.Y.U., professors in the first year develop themes of the regulatory state in connection with a substantive area of law that interests them. Ohio State's Jim Brudney, for example, teaches his course using issues from labor law; Ruth Coker draws from anti-discrimination law; but both use theories of legislation and theories of statutory interpretation. I think it is an excellent model.

3. *Introduction to Legal Methods.* A third kind of model is inspired by the idea that reasoning from and about statutes is now a fundamental method of legal analysis in the United States. In the 1940s, Karl Llewellyn and Ed Levi developed a legal methods course at Chicago; Levi's course had some fine statutory interpretation problems. Today, a number of law professors have revived this kind of course, but focus more heavily on statutes and administrative regulations. For example, Jane Ginsburg and Peter Strauss at Columbia have developed their own materials introducing first-year students to principles of legal reasoning, with a focus on statutes.

4. *Political and Legislative Process.* A fourth model focuses on the political process itself, including the electoral process, the lobbying process, and the legislative deliberative process. These important issues of law and democracy can be explored at a level of doctrinal depth and intellectual sophistication not possible twenty years ago, largely because there has been so much constitutional litigation and productive theorizing by both political scientists and law professors, and because Rick Pildes, Pam Karlan, and Sam Issacharoff have pub-

lished an excellent and influential casebook that draws these theoretical and doctrinal materials together.<sup>22</sup>

5. *Clinical Approaches to Legislation.* A fifth model teaches legislation as clinical subject combining theory and practice. Georgetown's Phil Schrag and a few other professors have experimented successfully with simulation exercises, such as student legislatures. The approach that seems more popular today is legislation clinics, where students work with clients—legislators, administrators, or private groups and lobbyists. Yale had a casual program along these lines in the 1970s. Wally Mlyniec and I pushed for a more formal program at Georgetown in the 1980s, and Dean Judith Areen established a successful legislation clinic there that is now headed by Chai Feldblum.

6. *State and Local Governments.* A sixth approach to teaching legislation is to focus on state and local governments. Most law is made and enforced at the local level, and the political and legislative processes work differently at that level. Georgetown's David McCarthy and Columbia's Richard Briffault have pioneered courses on state and local government, and an increasing number of law schools now have offerings in this area.

As to the future of legislation, well, I am an optimist. This will continue to be a growth area in a variety of ways. Legislation will be taught as a survey course at an increasing number of law schools, will be cannibalized for an increasing number of legal methods courses, and will continue to generate exciting scholarship, especially as it encourages more collaborations between law professors and political scientists.

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22. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (rev. 2d ed. 2002).

